

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICK J. SLOAN and U.S. POSTAL SERVICE,
POST OFFICE, Willingboro, NJ

*Docket No. 99-924; Submitted on the Record;
Issued January 19, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion in denying appellant's request for review.

In this case, the Office accepted that, on June 24, 1983, appellant, then a 44-year-old letter carrier, sustained internal derangement of the right knee with chondromalacia of the medial femoral condyle, in the performance of duty. Appellant underwent 4 arthroscopic procedures and was eventually granted a schedule award for a 44 percent permanent impairment of the right lower extremity. Appellant returned to limited duty in 1993, but by 1994 he was only released to work four hours a day, due to his accepted condition and his multiple surgeries.

On November 12, 1990 and February 2, 1991 appellant filed claims for a consequential back injury, which he alleged was causally related to having fallen as a result of his accepted knee conditions. On March 20, 1997 appellant filed a claim for a recurrence of total disability, due to his accepted knee conditions. The Office has adjudicated appellant's consequential injury and recurrence claims separately.

In a decision dated March 2, 1992, the Office denied appellant's claim for a consequential back injury on the grounds that he had submitted insufficient medical evidence to meet his burden of proof. By letter dated August 26, 1992, appellant, through counsel, requested reconsideration and submitted a May 13, 1992 report from Dr. I. David Weisband, appellant's treating osteopath, in support of his request. In a decision dated October 14, 1997, the Office found the report of Dr. Weisband to be insufficient to warrant modification of the prior decision. By letters dated October 22, 1997 and January 6, 1998, appellant, through counsel, requested reconsideration of the Office's October 14, 1997 decision and submitted additional evidence in support of his request. In a decision dated February 17, 1998, the Office found the newly

submitted medical evidence to be insufficient to warrant reopening appellant's claim for merit review.

With respect to appellant's claim for a recurrence of total disability causally related to his accepted right knee conditions, in a decision dated March 4, 1998, the Office denied appellant's claim on the grounds that he had submitted insufficient medical evidence to meet his burden of proof. Appellant requested an oral hearing, and in a decision dated January 6, 1999, an Office hearing representative set aside the Office's prior decision and remanded the case to the Office to be referred to a medical specialist for further medical development.

Initially, the Board notes that, as the January 6, 1999 decision of the Office hearing representative set aside and remanded the March 4, 1998 decision of the Office on the issue of appellant's claimed recurrence of total disability, the Board has no jurisdiction over this matter in the present appeal as this matter is in an interlocutory position before the Office.¹ Therefore, the only decision before the Board in this appeal is the Office's decision dated February 17, 1998 denying appellant's application for review with respect to his claim for a consequential back injury. As more than one year elapsed between the date of the Office's most recent merit decision on appellant's consequential injury claim, dated and finalized on October 14, 1997, and the filing of appellant's appeal, postmarked January 22, 1999 and received by the Board on January 25, 1999, the Board lacks jurisdiction to review the merits of appellant's consequential injury claim.²

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.⁴ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁵ To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.⁶

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and

¹ See 20 C.F.R. § 501.2(c).

² 20 C.F.R. § 501.3(d)(2).

³ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.138(b)(1) and (2).

⁵ *Eugene L. Turchin*, 48 ECAB 391 (1997); *Linda I. Sprague*, 48 ECAB 386 (1997).

⁶ 20 C.F.R. § 10.138(b)(2).

probable deduction from established facts.⁷ In support of his most recent request for reconsideration of his claim for a consequential back injury, appellant submitted progress notes and a narrative report, both dated October 2, 1997, from Dr. Laura E. Ross, appellant's treating osteopath. In her narrative report, Dr. Ross stated in pertinent part:

"[Appellant] has been a patient under my care since October 24, 1996. He has had multiple problems including a herniated nucleus pulposus at L4-5 with lumbar stenosis, a herniated nucleus pulposus at L5-S1, and a right L5 radiculopathy. In addition to this, he has had progressively worsening osteoarthritis of the medial compartment of the right knee. In my opinion, this has occurred over time as a result of his initial injury in 1983 which was an apparent work-related injury in which he twisted his right knee and required surgical intervention at that point in the way of arthroscopic medial meniscectomy. He was also noted to have a large chondral defect with softening and fraying of the articular surface of the medial femoral condyle and its weight-bearing surface. This would be consistent with an injury of that nature and would also be consistent with a medial meniscal tear. He had undergone a drilling chondroplasty of the medial femoral condyle by Dr. Weisband in 1987 and this appeared to alleviate the pain somewhat; however, he has had progressive worsening of his osteoarthritis, which would be expected with this type of injury. An MRI [magnetic resonance imaging], which was performed in April of this year, revealed medial compartment arthrosis of the right knee."

The remainder of Dr. Ross' report pertains solely to the treatment and prognosis for appellant's employment-related knee condition. While Dr. Ross clearly diagnosed appellant as having multiple lumbar disc herniations, and further discussed appellant's employment-related knee condition, she does not discuss the causal relationship, if any, between appellant's accepted knee conditions and his diagnosed back conditions. Evidence that does not address the particular issue involved does not constitute a basis for reopening the claim.⁸ As Dr. Ross did not offer an opinion as to the cause of appellant's back conditions in either her October 2, 1997 progress notes or narrative report, these reports are insufficient to require the Office to reopen appellant's claim for a review of the merits.⁹ As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

⁷ See *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

⁸ *Richard L. Ballard*, 44 ECAB 146, 150 (1992).

⁹ *Id.*

The decision of the Office of Workers' Compensation Programs dated February 17, 1998 is hereby affirmed.

Dated, Washington, DC
January 19, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member